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No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Petitioner,

v.

BRENDA CHILCUTT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Federal Bar Association respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for respondent Brenda Chilcutt has refused consent.

The Federal Bar Association is a nationwide organization with more than 14,500 attorney members. The majority of association members have at some time in their professional careers served in the public sector.

Approximately 2,800 members are presently government attorneys, and the remainder are in private practice or other pursuits. The association's members share a common interest in federal practice.

The Federal Bar Association has a direct interest in this case. As one publication recently noted, the instant case, while beginning as a "small and routine slip and fall case . . . grew into one of the more significant judicial ethics decisions in recent years" and "has wide implications for government lawyers." *Pass It On: Newsletter of the Government and Public Sector Lawyers Division* (American Bar Association), Vol. 3, No. 3 (February/April 1994), at 7. The Federal Bar Association is troubled that the findings of intentional attorney misconduct in this case were made in a procedurally defective and unfair manner, and that the inappropriate appellate fact finding at issue here does not appear to be an isolated occurrence in cases involving alleged attorney misconduct. In the view of *amicus,* the need for strict adherence to proper procedures, and respect for the differing roles of trial and appellate tribunals, is particularly acute where, as here, a lawyer has been accused of intentional misconduct. Such allegations pose a risk of serious, even devastating, personal and professional consequences. It is, therefore, imperative that the courts of appeals not overstep the bounds of appropriate appellate review.

The Federal Bar Association is also concerned that decisions such as the one at issue here may exert an inappropriate chilling effect on attorneys evaluating whether to seek appellate review. If an attorney may be subjected to sanction, and personal vilification, on the basis of factual findings made in the first instance by an appellate tribunal, that attorney may well feel pressure not to pursue an otherwise meritorious appeal.

On behalf of its government employee members, the Federal Bar Association also has a direct interest in the question whether a federal court may properly forbid the

Department of Justice from reimbursing one of its employees for sanctions imposed pursuant to Federal Rule of Procedure 37. Allowing federal courts to limit reimbursement by the Department of Justice raises serious sepration of powers concerns. In this case, the court of appeals believed its finding of intentional misconduct removed any need for serious consideration of these separation of powers issues. If, as we request, the finding of intentional misconduct is vacated, this important separation of powers issue will receive a proper airing on remand. More broadly, the Federal Bar Association is concerned that judicial orders forbidding reimbursement of an attorney by his or her employer should be imposed only in special circumstances where intentional misconduct has been clearly proven.

For all the foregoing reasons, the Federal Bar Association respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The interest of *amicus* is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae.

STATEMENT

This is an extraordinary case in which the United States Court of Appeals for the Fifth Circuit has affirmed the imposition of severe personal discovery sanctions upon an Assistant United States Attorney, Randell Means, on the ground that Mr. Means intentionally concealed inculpatory evidence during discovery in a civil case. The district court, however, made no findings of intentional concealment—or any other intentional wrongdoing—and the independent findings made by the appellate panel in

support of its result are demonstrably wrong in critical respects. To make matters worse, the court of appeals' published opinion contains an unusually harsh and inflammatory personal rebuke of Mr. Means. Pet. App. 17a-18a. Because the court of appeals departed so far from the accepted course of judicial proceedings, and produced so manifestly unjust a result, the Federal Bar Association joins petitioner in urging summary reversal of the decision below.

The facts of the case are ably set forth in the petition for certiorari. The key points are as follows:

1. The district court's decision to sanction Randell Means *did not* rest on any factual finding that Means intentionally withheld information during discovery or misrepresented facts to the court. Indeed, the district court's decisions to impose a monetary sanction on Means, to forbid Means from seeking reimbursement for payment of that sanction, and to designate certain facts as proven (all pursuant to Federal Rule of Civil Procedure 37) were rendered more than a month *before* the district court even held a hearing as to whether Means had intentionally withheld information.

2. Upon concluding a subsequent evidentiary hearing into whether Means had intentionally concealed information during discovery, the district court decided that it would give Means "the benefit of the doubt," and *did not find intentional concealment*. Pet. App. 116a. The district court specifically found that a witness whose testimony exonerated Randell Means from any intentional concealment was "basically being honest." Pet. App. 114a.

3. Far from showing intentional concealment, the district court record reveals a plausible explanation for the discovery lapses at issue: confusion resulting from the existence of *two* separate accident logs. The log Randell Means reviewed did not, in fact, contain information responsive to plaintiff's discovery request. The other log

at issue did contain such information, but Mr. Means was unaware of the existence of that log until *after* he had made representations to the district court about the contents of the logs at issue. The custodian of that log testified at length that he did not make its existence or contents known to Randell Means until he arrived at the courthouse for the afternoon session of the hearing on June 4, 1992, at which he produced the log in question.

4. The court of appeals plainly did not rest its ruling on the district court's findings of fact. Nor did it conclude that the district court's findings were clearly erroneous in any respect. Instead, the Fifth Circuit made its own independent findings, based on what it described as "credible evidence in the record." Much of that evidence was testimonial in nature, and the appeals court's conclusions specifically required it to make credibility determinations.

5. At least two of the critical factual "findings" on which the appeals court's opinion rests are demonstrably wrong. First, the court of appeals wrongly concluded that Randell Means had misrepresented the contents of the accident logs. Second, the court of appeals wrongly concluded that Randell Means intentionally concealed the existence of a "Form 1769." There was some conflict in the record as to whether the respondent in this case, Brenda Chilcutt, ever filled out such a form. But the government employee responsible for maintaining these forms expressly testified that no such form was in the files. The district court made no finding that such a form existed, and thus made no finding that Means intentionally concealed, or even failed to produce, such a form.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and summarily reverse the decision below. *Amicus* recognizes that this case does not present any unsettled legal issue warranting full briefing and argument. Nevertheless, the Fifth Circuit's decision so far departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is warranted to correct the appeals court's departure and ameliorate its excessively harsh consequences. *See* Supreme Court Rule 10.1(a).

It is beyond dispute that a United States Court of Appeals lacks the competence and authority to engage in independent fact finding. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986); *Amadeo v. Zant*, 486 U.S. 214 (1988). Indeed, *de novo* appellate fact-finding may well exceed the jurisdiction conferred by 28 U.S.C. § 1291, which extends only to "appeals from final decisions of the district courts."

Unfortunately, improper appellate fact finding would appear to occur with some frequency in cases involving alleged attorney misconduct. *E.g., United States v. Tarricone*, No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994) (vacating panel's prior finding of prosecutorial misconduct and remanding to district court); *United States v. Best*, 939 F.2d 425 (7th Cir. 1991) (en banc) (vacating panel finding of misconduct by Assistant United States Attorney, and remanding to district court), *cert. denied*, 112 S. Ct. 1243 (1992); *United States v. Ofshe*, 817 F.2d 1508 (11th Cir.) (panel finding of misconduct by Assistant United States Attorney), *cert. denied*, 484 U.S. 963 (1987). Doubtless this phenomenon reflects good intentions. Appellate judges in particular may feel a sense of responsibility for policing professional ethics, as well as a growing frustration with the corrosive effects of overly aggressive advocacy. Nevertheless, appellate judges are no better equipped to make *de novo*

factual determinations in attorney misconduct cases than they are in any other.

To the contrary, the rule against appellate fact finding should apply with particular force where, as here, allegations of professional misconduct have been made. *First*, as this case amply demonstrates, allegations of attorney misconduct will often turn on issues of credibility and motive—issues that appellate tribunals are particularly ill suited to resolve. Deciding whether failure to produce discoverable information was the result of oversight or intentional concealment will typically require an assessment of counsel's credibility. Such disputes will also require a court to sort out disparate and potentially conflicting testimony as to who was responsible for failing to produce a document. Though counsel is ultimately responsible for ensuring compliance with discovery requests, counsel will typically discharge that responsibility with the substantial assistance of the client's employees. Where more than one individual participates in the process of responding to discovery requests, allegations of intentional concealment can be resolved only by determining which individual participants in the discovery process, if any, are ultimately at fault.

Second, the stakes are especially high in attorney misconduct cases. Erroneous factual determinations not only result in wrong decisions on the merits, but may also have devastating and irreparable consequences for the professional reputations of practicing attorneys. A finding of intentional misconduct is serious business. As the Ninth Circuit has recognized, "published opinions chastising [counsel] by name" constitute a "serious sanction." *United States v. Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). "Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation." Kauf-

man, *Judicial Ethics: The Less-Often Asked Questions*, 64 Wash. L. Rev. 851, 864 (1989).

United States v. Ofshe illustrates the risks. In that case, in the course of finding prosecutorial misconduct, the appeals court gratuitously labelled as "reprehensible" the conduct of an Assistant United States Attorney. The prosecutor filed a motion with the Eleventh Circuit asking it to remove the footnote addressing the ethics of his conduct, and arguing that the public censure, without notice, violated his right to due process. (11th Cir. Docket No. 86-5351.) The court responded with an unreported opinion which, while determining that the prosecutor had no standing to make the motion, nevertheless, and without affording him any opportunity for a hearing, characterized his conduct even more harshly. Further, while the original opinion encouraged the district judge to report the prosecutor to his bar disciplinary commission, the second opinion "expressly invited . . . indictment . . . for the crime of obstruction of justice." *See* Uviller, *Presumed Guilty: The Court of Appeals Versus Scott Turow*, 136 U. Pa. L. Rev. 1879 (1988).

Subsequently, the Public Integrity Section of the Department of Justice determined there was no probable cause to prosecute, and the Illinois Supreme Court Attorney Registration and Disciplinary Commission dismissed its investigation of the attorney's conduct. *See* Kaufman, *supra*, at 865-66. "When the state disciplinary authorities decided to dismiss their investigation, however, there was no public notice of that at all. The only item of public record is the Court of Appeals' negative comment." *Id.* Observing that the Assistant United States Attorney in that case was "without recourse," one commentator noted that

> Instructed by experience, he will surely not petition the same court . . . . So without notice, without an opportunity to be heard, and without access to a

> reviewing tribunal, Turow's professional reputation is impugned for lawful behavior, in accord with the policy of his office and the Department of Justice, undertaken in the interests of law enforcement. In effect, a panel of the Court of Appeals for the Eleventh Circuit sat as a grand jury, voted a true bill, and Turow, without a trial forum, will be forever presumed guilty.

Uviller, 136 U. Pa. L. Rev. at 1901.

Petitioner Randell Means was victimized in precisely this way. The Fifth Circuit pronounced a scathing indictment, finding that he "flagrantly and willfully disregarded . . . discovery obligations," "intentionally with[held] documents," and made "blatant misrepresentations to the district court." Pet. App. 17a-18a. These accusations were, as demonstrated in the petition for certiorari, without foundation in the district court's findings, or even the record evidence. The appeals court's willingness to reach these conclusions on the basis of its own evaluation of the record evidence—which consisted principally of witness testimony—deprived Means of even the rudiments of fair process.

In analogous circumstances, the Court has recognized that allegations of attorney misconduct involve:

> adversary procedures of a quasi-criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended.

In re Ruffalo, 390 U.S. 544, 551 (1968). Appellate court fact finding in the circumstances of this case brings about the same result because it effectively changes the nature of the "charges" of attorney misconduct at issue, after briefing has been concluded, and after the attorney has any meaningful opportunity to present a complete factual and legal defense to the charges.

Summary reversal is all the more warranted here because the Fifth Circuit could have invoked appropriate

procedural options available to explore any qualms the panel may have had about intentional wrongdoing or contumacious conduct. The court could have remanded to the district court with instructions to make factual findings, or the court could have recommended referral to the state bar disciplinary committee. That is precisely the course other courts of appeals have followed when, upon reflection, they determined that their prior conclusions respecting attorney misconduct lacked a sufficient record foundation. *E.g., United States v. Tarricone,* No. 1175, 1993 WL 617556 (2d Cir. Apr. 5, 1994) (vacating panel's prior finding of prosecutorial misconduct and remanding to district court); *United States v. Best,* 939 F.2d 425 (7th Cir. 1991) (en banc) (vacating panel finding of misconduct by Assistant United States Attorney, and remanding to district court), *cert. denied,* 112 S. Ct. 1243 (1992).

Summary reversal will also ameliorate other disturbing features of the Fifth Circuit's decision. Particularly given the publicity it has received, that decision may well exert an inappropriate chilling effect on attorneys evaluating whether to seek appellate review. If an attorney may be subjected to sanction, and personal vilification, on the basis of factual findings made in the first instance by an appellate tribunal, that attorney may well feel pressure not to pursue an otherwise meritorious appeal—pressure that may well give rise to conflicts of interest between counsel and client.

Furthermore, as a result of its improper findings of intentional misconduct, the Fifth Circuit never came to grips with important questions as to the propriety of forbidding Randell Means from being remibursed for the monetary sanctions imposed. Allowing federal courts to limit reimbursement by the Department of Justice raises serious separation of powers concerns, particularly where intentional misconduct is not found. Constitutional questions aside, there are serious issues whether it is within a

district court's discretion to forbid reimbursement for sanctions absent a finding of intentional misconduct. Forcing an individual attorney to bear such costs—which may well be severe—for conduct in the course of employment is a particularly draconian sanction that should be reserved only for the most egregious cases of misconduct—cases far removed from the one at hand.

CONCLUSION

The petition for certiorari should be granted and the decision of the court of appeals should be summarily reversed.

Respectfully submitted,

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